IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 18TH JANUARY 2007 / 28TH PAUSHA 1928

WP(C).No. 2102 of 2007(A)

AGAINST THE ORDER DATED 19/12/2006 IN IA 5290/06 & 309/04 IN OS.141/1985 of I ADDL.SUB COURT, KOZHIKODE

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PETITIONER:

MRS.K.P.MUTHULAKSHMI AMMA,
D/O.K.P.SREEDEVI AMMA, AGED 75 YEARS, AND
RESIDING AT PANNIYANKARA AMSOM DESOM,
KOZHIKODE TALUK.

BY ADV. SMT.PRABHA R.MENON
SRI.M.KRISHNAKUMAR

RESPONDENTS:

1. SMT.RADHA KRISHNANUNNI,
W/O. LATE KRISHNANUNNI, AGED 56 YEARS,
"JAYASREE" SIVAPURI COMPOUND, WYNAD ROAD,
KOZHIKODE.

2. JAYASREE,
D/O.LATE K.RISHNAN UNNI,
AGED 38 YEARS, RESIDING AT 'JAYASREE',
SIVAPURI COMPOUND, WYNAD ROAD, KOZHIKODE.

3. RAJASREE, D/O.LATE KRISHNAN UNNI,
AGED 32 YEARS, RESIDING AT 'JAYASREE',
SIVAPURI COMPOUND WYNAD ROAD, KOZHIKODE.

4. JAYARAM, AGED 41 YEARS,
S/O.LATE KRILSHNAN UNNI, AGED 341 YEARS,
RESIDING AT 'JAYASREE', SIVAPURI COMPOUND,
WYNAD ROAD, KOZHIKODE.

5. DR.K.P.JANARDHANAN,
S/O.SREEDEVI AMMA SCIENTIST,
AGED 72 YEARS, RESIDING AT 1 SUDDER STREET,
CLACUTTA.

6. DR.K.P.RAJAGOPAL,
S/O.SREEDEVI AMMA SCIENTIST,
AGED 68 YEARS, RESIDING AT SREELAKSHMI NELLIKODE,
CALICUT-17.

BY

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 18/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

W.P.(C)NO. 2102 OF 2007

DATED THIS THE 18th DAY OF JANUARY, 2007

JUDGMENT

Petitioner is second defendant in O.S.141/1985 on the file of Sub Court, Kozhikode-I. Suit was originally filed by brother of petitioner. Suit is for partition. Plaintiff died during the pendency of the suit. Respondents 1 to 4 got themselves impleaded as additional plaintiffs. First defendant, the mother of petitioner and deceased plaintiff, died on 24.12.02. Respondents 1 to 4 applied to the Court to implead all her children as legal representatives. Petitioner contending that first defendant had executed a registered will on 24.1.2001 where under she bequeathed all her rights to petitioner, the only daughter, filed I.A.309/04 to record her alone as the legal representative on the strength of the will. It was opposed by respondents 1 to 4 and fifth respondent contending that the will is not genuine and deceased first defendant had no testamentary capacity at the time, when the will was executed , she being a cancer patient for several years and had undergone operation.

2. Learned Sub Judge let in evidence on the application for impleading. Petitioner filed I.A.2859/06 to call for documents from

Rajendra Nursing Home, where deceased first defendant had undergone operation. Doctor Rajendran of Rajendra Nursing Home produced documents before the Court. Respondents 1 to 4 reported that they have no oral evidence. Learned Sub Judge marked the documents as Ext.A5 to A16 and X5 series and closed the evidence. Petitioner filed I.A.5290/06 to review that order contending that the documents should not have been marked without adducing oral evidence and the exhibits marked by the Court are the medical records which cannot be relied on without evidence and therefore the order is to be reviewed. Under Ext.P2 order the petition was dismissed. It is challenged in this petition filed under Article 227 of Constitution of India.

2. Learned Counsel appearing for petitioner was heard.

3. The dispute between the parties is whether the registered will executed by deceased first defendant was vitiated or not.

4. Plaintiffs contended that at the time of execution of the will,deceased was not in a sound disposing mind and therefore it was not a voluntary testament and hence petitioner herein alone is not entitled to claim that she is entitled to the rights of first defendant. According to plaintiffs,deceased first defendant was a cancer patient and was operated from Rajendra Nursing Home and

was not in a sound dispensing mind when she allegedly executed the registered will. It is to prove the said contention of plaintiffs, the doctor from Rajendra Nursing Home was summoned and Ext.X5 documents were marked. There is force in the arguments of learned Counsel appearing for petitioner that by mere marking of the documents and without proof, the documents though marked cannot be relied on. Under Ext.P2 order, learned Sub Judge only held that, when the documents were sought to be marked, it was not objected to and therefore they were marked. The fact that the documents were marked, will not dispense with the requirement of proof of the documents if to be relied on.

5. Arguments of learned Counsel appearing for petitioner is that attempt is to cast suspicion by producing the documents and marking them without proof and being the propounder of the will petitioner is burdened with a duty to remove the suspicion and therefore without evidence the documents may not be relied on and petitioner should have been granted an opportunity to summon the doctor and adduce evidence.

This petition is disposed directing Sub Judge, Kozhikod to permit petitioner to examine the doctor from Rajendra Nursing Home or any other witness in support of the case that registered will was executed by deceased voluntarily and in a sound disposing

mind. It is also made clear that for the reason that the documents are marked, it cannot be taken that the documents are proved. Learned sub Judge to decide the question only after affording an opportunity to petitioner to adduce evidence.

M.SASIDHARAN NAMBIAR,JUDGE

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M.SASIDHARAN NAMBIAR,JUDGE

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